FILE COPY

FEB 4 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner,*

vs.

ED C. WRIGHT, DOING BUSINESS AS ED C. WRIGHT & COMPANY, SUCCESSOR TO ED C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT ED C. WRIGHT.

MILLER WALTON,
S. O. CARSON,
Counsel for Respondent, Ed C. Wright.

WALTON, LANTAFF, ATKINS & CARSON,
Of Counsel.

INDEX.

Subject Index.

	Page
Statement of the case	1
Argument	14
1. Section 83(j) merely authorizes the holders of new securities that were issued and accepted in the partial completion of a voluntary refunding to be counted as creditors consenting that the refunding shall be completed as a Plan of Composition	14
2. The plan evidenced solely by Ordinances 269 and 289, sought to be put into effect by the petition, is not the plan proposed in 1937, and is not in any sense a partially executed Plan of Composition	24
3. The plan evidenced by Ordinances 269 and 289 was not submitted nor accepted in good faith, and the consents of holders of the new securities were improperly voted in its favor	34
4. The procedure suggested in the minority opinion should not be followed	40
Conclusion	41

Table of Cases Cited.

American United Life Ins. Co. v. *Haines City*, 5 Cir., 117 F. 2d 574	18,20
American United Mut. Life Ins. Co. v. *Avon Park*, 311 U. S. 138	30
American National Bank v. *City of Sanford*, 5 Cir., 112 F. 2d 435	18
Davis v. *City of Homestead*, 5 Cir., 112 F. 2d 438	18
Group of Industrial Investors v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523	33
In re M. & H. Gordon, 245 F. 905	30
In re City of West Palm Beach, 5 Cir., 96 F. 2d 85	16
Kaufman County Levee Imp. Dist. No. 4 v. *Mitchell*, 5 Cir., 116 F. 2d 959	30

Page

Kelley v. *Everglades Drainage District*, 319 U. S. 415... 33
Wells Fargo Bank & Union T. Co. v. *Imperial Irr. Dist.*, 10 Cir., 136 F. 2d 539 19

STATUTES CITED.

Bankruptcy Act, § 83(j) 14

TEXTS CITED.

10 Remington on Bankruptcy, § 349 18
University of Pennsylvania Law Review (Vol. 90, No. 5, March, 1942) 18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

CITY OF CORAL GABLES, A MUNICIPAL CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF FLORIDA, *Petitioner,*

vs.

ED C. WRIGHT, DOING BUSINESS AS ED C. WRIGHT & COMPANY, SUCCESSOR TO ED C. WRIGHT & COMPANY, INC., AND AMERICAN NATIONAL BANK OF NASHVILLE, TENNESSEE, A NATIONAL BANKING CORPORATION, *Respondents.*

BRIEF ON BEHALF OF RESPONDENT ED C. WRIGHT.

Statement of the Case.

The brief of the City fails to mention a substantial part of the material facts, does not state others fairly, and changes the theory relied on in the Courts below.

The City alleged in its Petition, and urged in the Courts below, that it was seeking to use the consents of holders of new securities, as authorized in § 83(j) of the Bankruptcy Act, to coerce the completion of a Plan of Composition

that had been partially executed by the issuance and acceptance of the new securities (R. 13, 915, 932, 1861).

The present contention is that notwithstanding the partial execution of a settlement program providing for the issuance of new securities to refund only the claims of accepting creditors and for the best possible compromises of the unrefunded claims, § 83(j) nevertheless permits the dropping of the provision for compromises, the re-enactment and submission of only the refunding provisions, not as a partially executed but as a new Plan of Composition, and the use of consents thereto by holders of the new securities to coerce the scaling of the remaining unrefunded and uncompromised claims on terms less favorable than those accorded any creditor whose claim was compromised.

By reason of the foregoing, the statements made in the brief of the City must be supplemented.

On December 23, 1936, the City enacted Ordinance 269 authorizing the issuance of Refunding Bonds and Tax Participation Certificates to refund its indebtedness (R. 57-95), and on December 24, 1936, proposed to its creditors a form of agreement detailing the terms and conditions on which the new securities were offered (R. 1482-1516, 663, 842). The agreement provided that the refunding plan, of which Ordinance 269 was expressly made a part (R. 1508), should become operative only when accepted by holders of a sufficient amount of the principal indebtedness, in no event less than 90%, to insure the ability of the City to perform the plan and make it feasible and practicable (R. 1514).

On February 3, 1937, the City entered into a different form of agreement with a bondholder committee, usually called the "Barker Committee," providing that the refunding should be "consummated" when and if they should each determine, to their own satisfaction, and in their own discretion, that an amount of the indebtedness sufficient to assure the success of the refunding had become obligated

to accept the terms offered by Ordinance 269 (R. 1478, 1477-82, 663, 842).

On June 30, 1937, the City entered into a contract which provided, inter alia, that its representative, Mr. Exselsen, should "negotiate special adjustments with those creditors who may not have consented to the Refunding Plan at the time the same is declared operative, it being understood that each of such special adjustments is to be dealt with specially by the City Commission after the same have been negotiated to a point where the greatest savings can be effected and the most favorable terms to the City developed" (R. 1476, 1470-77, 662, 842).

The several instruments were component parts of a settlement program which provided that the refunding should be "consummated" when accepted by holders of an amount of the indebtedness, in no event less than 90%, sufficient to assure its feasibility, practicability, and success, and that "special adjustments," on terms as favorable to the City as could be developed, should be negotiated with the remaining creditors (R. 321-35, 1773-82, 1860-71).

On August 16, 1937, before any new securities had been issued, Ch. IX (then Ch. X) of the Bankruptcy Act became effective. The City decided it would not submit itself to the jurisdiction of the Bankruptcy Court, but in lieu of doing so, would effectuate the settlement program by consummating the refunding and negotiating for special settlements of the remaining claims (R. 1278-80).

From September 24 to 30, 1937, the City delivered, and the participating creditors accepted, Refunding Bonds and Tax Participation Certificates in exchange for more than 90% of the bonds and appurtenant interest theretofore outstanding (R. 1238-39, 1830). This left the non-consenting minority holding claims aggregating approximately $1,257,072.42 (R. 55, 1521-29, 788, 842), which were to be disposed of by individual special settlements. From Octo-

ber 18, 1937, to December 15, 1938, the City consummated twenty-nine special settlements with non-consenting minority creditors holding claims totalling $597,448.17 (R. 1521-29). The City also entered into and partially consummated agreements providing that installment payments would be made, over periods of years, in settlement of various minority claims aggregating more than $175,456.43, and expressly covenanted in two of the agreements that it would not resort to bankruptcy (1695-1700, 1670, 1715-18, 332).

The settlements were not made on uniform terms. Each represented the "best trade" the City could effect with the individual creditor (R. 788-829). Some were consummated by purchasing outstanding bonds or interest obligations, or both. Others were effected by compromise payments in satisfaction of judgments (R. 1521-29). Still others took the form of agreements providing for full payment of the claims, at reduced interest rates, from the proceeds of annual special earmarked tax levies to be made over varying periods of years (1695-1700, 1670, 1715-18, 332).

The creditors with whom the twenty-nine settlements were made received $263,961.34 cash and $13,000 Refunding Bonds, instead of the $228,651.56 Refunding Bonds and $368,796.61 Tax Participation Certificates that would have been allotted to them had they participated in the refunding (R. 1521-29, 1639, 1640, 1216, 1239). The cash so received was $158,252.42 more than they could have obtained by the acceptance and immediate sale of new securities (R. 1639, 1640). With the total cash received they could have purchased Refunding Bonds and Tax Participation Certificates in amounts equal to those they would have received by participating in the refunding, plus more than $272,000 additional Refunding Bonds, or more than $1,000,000 additional Tax Participation Certificates (R. 1639, 1640).

The making of the special settlements was approved, authorized, and consented to, by the creditors who had accepted Refunding Bonds and Tax Participation Certificates (R. 1778, 1866, 1868). Those creditors, or their successors in title, are the creditors whose consents were later solicited, given, and are sought to be used in this proceeding to coerce the acceptance by the remaining minority creditors of consideration different from and less valuable than the consideration received by any creditor with whom a special settlement was made (R. 1861-63, 1866-67).

The money paid by the City to the beneficiaries of some special settlements was derived from the sale of delinquent tax assets (R. 1517-18, 711, 842, 727-29). This money is the so-called "free funds," the reason for that designation being that in § 10 of the agreement of December 24, 1936, the participating creditors waived any right to share in those assets (R. 1503). No such waiver has been made by the non-participating creditors.

Section 10 provided that in consideration of the waiver by the participating creditors, the proceeds of the liquidation of the delinquent tax assets would be applied, in scheduled annual amounts, over a ten year period, to the purchase and retirement of Refunding Bonds at less than par value, but the City should "be under no obligation to apply to the purchase of refunding bonds any net proceeds in any manner realized from the liquidation" of the delinquent tax assets "during the calendar year 1937" (R. 1503-04). Instead of liquidating such assets over a period of time, the City sold them in bulk in 1937, for $457,691.01 and used the greater part of the proceeds in making the special settlements (R. 1517-18).

When the City made the twenty-nine settlements involving claims totalling $597,448.17, it did not treat the claims as having been paid or retired (R. 752, 753). Instead, they were treated as live, existing claims, and the City

refunded them by issuing Refunding Bonds and Tax Participation Certificates to itself (R. 790-819). Thereafter the City paid to itself interest on such Refunding Bonds and distributions on such Tax Participation Certificates (R. 1627, 957).

The obligations thus refunded included several judgments that had been satisfied, in whole or in part, in making the twenty-nine settlements (R. 1518, 1521-29). For instance, the settlement with Helen O'Connell resulted in the full satisfaction of a judgment totalling $40,372.36, on which the City issued to itself $15,000 Refunding Bonds and $24,375 Tax Participation Certificates (R. 1521). The settlement with Henry A. Thies resulted in the full satisfaction of a judgment for $54,802.59, on which the City issued to itself $20,000 Refunding Bonds and $33,200 Tax Participation Certificates (R. 1521). The settlement with Fiduciary Counsel, Inc. included a payment of $8,000 in satisfaction of that much of a judgment, but the City issued to itself $4,000 Refunding Bonds and $4,000 Tax Participation Certificates (R. 1522).

One settlement was made with Wright, from whom the City purchased past due claims aggregating $53,781.25 (R. 1524, 1274-75) but he did not know the City was the purchaser (R. 1275-76). A City Commissioner was delegated to negotiate with him (R. 1274). The Commissioner told Wright it might be possible to arrange for someone to buy his bonds, so he could get the money he seemed to want, and having accomplished that, the new owner might be willing to exchange them (R. 1275). Wright quoted a price (R. 1275). The Commissioner reported the price to the City Commission, which authorized the purchase of Wright's past due bonds, and the Commissioner then notified Wright to send the past due bonds to a New York City bank, where the purchase price would be paid (R. 1275). The transaction was consummated in that manner (R. 1275,

1518), and the City subsequently issued to itself $20,500 Refunding Bonds and $33,281.25 Tax Participation Certificates (R. 1524).

The Commissioner did not inform Wright that the City was the purchaser (R. 1275). Instead, he did everything to lead Wright to believe otherwise (R. 1276). The reason was that the City Commission thought it was not "good policy to let it be known that the City had any money to buy bonds" (R. 1276).

During the negotiations "a sort of a gentleman's agreement" was made between Wright and the Commissioner (R. 1276). The City knew that Wright had customers who relied on him in handling their bonds, some of whom might hold bonds of the City (R. 1276-77). Wright agreed that if the City would get him his price for his bonds, he would help in any way consistent with his own affairs in persuading such customers to participate in the refunding (R. 1277). The City knew that Wright held both past due and future maturing bonds, but its main purpose "was to get the past due bonds out of the way" (R. 1277). Only those were purchased (R. 1277, 1524). The City did not get Wright his price for, nor purchase, his unmatured bonds (R. 1277).

The City and Wright negotiated at various times in 1938, 1939, and the first six months of 1940, with a view to reaching a settlement of other claims held by Wright, but were unable to agree on terms (R. 1870, 859-62, 1280-84). Consequently, on February 24, 1940, without having finally terminated the negotiations with Wright, the City wrote to each creditor who had accepted Refunding Bonds and Tax Participation Certificates, a form letter in part as follows (R. 1573-75, 875, 1862):

> "You and others representing 94.18% of the City's obligations consented to the refunding and exchanged your bonds for the new refunding securities. • • •

> The holders of the remaining 3.98%, $326,000.00, of bonds, have not seen fit to cooperate. *The City Commission is not willing to grant to these few non-consenting creditors a better settlement than that which you accepted. Negotiations with these holdouts having failed to complete the refunding, the City is compelled to avail itself of the Municipal Bankruptcy Act. Municipal bankruptcy proceedings cannot, and will not, change the terms of the refunding bonds or tax participation certificates which you hold. The results will apply only to the unrefunded bonds.* • • • We ask that you immediately fill in, execute and return in the preaddressed postal envelope the enclosed preliminary consent and statement upon which the City will prepare and send to you for execution the final consent which will be necessary to enable the City to initiate and support the proceedings. *This consent will not obligate you financially in any way and is merely a ratification of your acceptance of the refunding plan.*" (Emphasis supplied.)

Accompanying the letter was a form of consent which, among other things, provided (R. 1575, 259-60, 1863):

> "With the understanding that there will be no obligation on my part for the expense of the proceedings and no other financial obligation of any nature and that it will not be necessary to surrender possession of my bonds of the issue of January 1, 1937, I assent to the filing of municipal bankruptcy proceedings as the necessary means of completing the refunding and will sign formal consent thereto when sent to me by the City."

On March 5, 1940, still without having finally terminated the negotiations with Wright, the City enacted Ordinance 347 reciting that "Ed C. Wright and Associates" had declined to accept Refunding Bonds and Tax Participation Certificates, that litigation had been brought to enforce the full payment of interest coupons, that there appeared to be

"no hope of an amicable settlement with said bondholders," that "it would be unfair to the holders of the refunding bonds and tax participation certificates • • • to submit to the payment of any old bonds and coupons in full," that the City was "morally and legally obligated to take all legal steps available to it to force the exchange of one hundred per cent of the old obligations for the refunding securities," and that the only procedure available to it was to file a Petition in Bankruptcy (R. 108-10).

The Ordinance found and determined that 3.07%, amounting to $252,000, of the old obligations, were owned by Wright and the bank, that the bank had brought suit on detached coupons, and that the City was unable to meet past due and unmatured debts, and desired to effect a plan for the composition of its indebtedness (R. 110). The Ordinance re-enacted, by reference, §§1 to 20, inclusive, of Ordinance 269, as amended by Ordinance 289, as a Plan of Composition, and directed the City Attorney to prepare and file "a petition in bankruptcy" (R. 110).

Notwithstanding the solicitation of the consents and the enactment of Ordinance 347, no "petition in bankruptcy" was filed for more than three months (R. 1). During that time, the City and Wright engaged in further negotiations looking toward the settlement of Wright's claims. The negotiations were in progress until and including June 27, 1940, the day on which the City filed its Petition for the confirmation of Ordinances 269 and 289 as a partially completed Plan of Composition (R. 1-111), and were not terminated until later that day, when the fact that the Petition had been filed was announced to conferees who had met to again discuss terms of settlement (R. 1280-84, 1870).

The Petition did not disclose the existence of the Exselsen contract providing for compromises with creditors who had not consented to the refunding at the time the latter was declared operative, nor did it disclose that any of the

special settlements had been made (R. 1-111). It further did not disclose that in making the twenty-nine special settlements involving claims totalling $597,448.17, many of which resulted in the satisfaction of judgments, the City nevertheless issued to itself Refunding Bonds and Tax Participation Certificates in amounts equal to or exceeding those the creditors would have received had they participated in the refunding (R. 1-111). These facts were brought out by Wright and other opposing creditors.

The only consents obtained by the City were given by holders of the new securities, and were consents to the submission and confirmation of Ordinances 269 and 289 as a partially executed Plan of Composition (R. 9, 111). They stated that the signer (R. 111), as the holder and owner of described Refunding Bonds or Tax Participation Certificates, or both, issued and outstanding as the result

> "of the partial completion or execution of the plan of composition evidenced by Ordinance No. 269, as amended by Ordinance No. 289 • • • which said plan of composition was readopted by Ordinance No. 347 adopted on the 5th day of March, 1940 as a plan for the composition of the debts of the said city, *hereby accepts and consents to the aforesaid plan of composition, adopted by the said City by said Ordinance 269 amended as aforesaid and re-adopted by Ordinance No. 347 on the 5th day of March 1940, and to be presented by a petition to the United States District Court for the Southern District of Florida, for the completion of said plan for the composition of said debts under the aforesaid plan in accordance with Chapter IX of the Acts of Congress relating to bankruptcy, as amended by Acts of Congress approved June 22, 1939.*"

The material evidence is uncontradicted, and there is no real conflict in the findings of subsidiary facts on which the Master, the District Judge, and the Court of Appeals, founded their ultimate conclusions. Their differences of

opinion are the result of conflicting conceptions of the law applicable to the facts.

The Master concluded that the evidence established the adoption in 1937, and the subsequent partial completion within the meaning of § 83 (j), of a Plan of Composition comprised solely of Ordinances 269 and 289, and that the Exselsen contract providing for special adjustments with creditors who had not consented to the refunding when the latter was declared operative, was a step "taken in a bona fide effort to bring about the acceptance of the Plan of Composition" (R. 325-27). He further concluded that the special settlements were made "in good faith in an effort to bring about the acceptance of the Plan of Composition" (R. 325), and recommended that the creditors holding the remaining unrefunded and uncomprised claims be compelled to accept the new securities offered by Ordinances 269 and 289 (R. 332). He found that in the agreements for special settlements with two creditors, the City had expressly covenanted that it would not resort to bankruptcy, but concluded the covenants were futile and ineffectual for any purpose other than to serve as an equitable basis for according the two creditors preferential treatment as against the creditors with whom no settlements had been made (R. 332-33, 334).

In approving the findings and conclusions of the Master, the District Judge wrote an unpublished Opinion, called an "Order," embodying additional findings and conclusions, including the following:

> "On June 30, 1937, the City entered into an agreement with Mr. Exselsen looking toward acceptance of its plan by creditors. Among the provisions of this contract was one looking toward Exselsen making special settlements with creditors, subject to the City's subsequent approval and confirmation. * * * (R 1775)
> "During the fall of 1937, and from time to time there-

after, various creditors of the City were dealt with and settlements were made with some creditors, and some of these creditors received larger percentages of realization on their debts than other creditors who had accepted refunding bonds. But in all of the settlements, which were completed with cash payments, the record shows there was a good faith effort on the part of the City, and there was never a departure from the effort of the City to effect the proposed refunding settlement with all of its creditors. These special settlements, can well be justified as consistent with the plan, (1) by reason of the pressing circumstances of litigation, and (2) the use of so-called free funds in the effecting of settlements. Also it is worthy of comment that the sanction of holders of refunding bonds was obtained, an unnecessary precaution unless the City was keeping in effect at all time the plan for settlement with all, either as a plan of settlement or with Subsection 'J' later enacted as a plan of composition. * * * The test to be applied, I hold, is whether the City relinquished its position as a debtor to make a settlement with all the creditors. Unequal amounts paid to some creditors resulted from pressure of litigation, and other justifiable causes, constituting not an inequality in the plan, but in an attempt to secure 100% acceptance, during all of which time the City had not departed from or given up its adopted plan of settlement. * * *" (R 1777-78)

The Court of Appeals concluded: 1) The plan evidenced solely by Ordinances 269 and 289, sought to be put into effect by the Petition, was not in any sense a partially completed plan, and was not the plan proposed in 1937. 2) The plan proposed in 1937 had been completed, not only in the respect that more than the 90% made a prerequisite to its taking effect had accepted, and the City had declared it in effect, but in the respect that after 94% of the creditors had accepted, it was abandoned, and other creditors were dealt with on the basis of "voluntary and often quite pref-

erential settlements." 3) The present proceeding is an entirely new proceeding, and in no proper sense a completion of the plan proposed in 1937. 4) The consents of the holders of new securities were not requested as a part of a plan, devised to protect the City from current financial involvements, requiring abnegations and sacrifices on the part of all creditors, but were requested, and were to be used, to "bludgeon into submission" the remaining non-participating creditors, "with whom the City had not been able to make settlements satisfactory to itself." 5) There was no identity of interests of the creditors consenting with creditors sought to be coerced by the consents. 6) "In respect of a partially executed plan which" is "still in process of completion," § 83(j) provides "that those who have already given their consent" can "vote now for then for the completion of the plan," but where, as here, a plan has been entirely completed, and it is sought to revive it under changed conditions for the sole purpose of forcibly scaling the debts of non-assenting creditors, § 83(j) does not authorize the consents of holders of new securities issued under the completed plan to be voted as effective consents. 7) The plan evidenced by Ordinances 269 and 289, sought to be placed in effect by the Petition, was not submitted in good faith, is not fair to the opposing creditors, and the consents of creditors who had taken new securities were not, under the circumstances the record discloses, properly voted in its favor (R. 1866-67).

One Circuit Judge thought the Interlocutory Decree should be reversed for reasons different from those stated in the main Opinion (R. 1867). He concluded "that the plan of composition of debts had not been completed when ninety-odd per cent of the bondholders had accepted refunding bonds" (R. 1867), but agreed "that the special settlements idea was a material part of the uncompleted plan," and "could not be dropped from the plan when the City de-

cided to take advantage of Chapter IX of the Bankruptcy Act and the procedure under Sec. 83 (j) thereof" (R. 1868). It was his opinion that the "case should be reversed and remanded with directions to allow amendments so as to: (a) include as an integral part of the whole plan the plan of special settlements; (b) reclassify the creditors * * *; and (c) afford to the non-consenting creditors the opportunity to accept a settlement as favorable as the most liberal special settlement heretofore made to any other creditor of the same class" (R. 1871).

Argument.

1. *Section 83(j) merely authorizes the holders of new securities that were issued and accepted in the partial completion of a voluntary refunding to be counted as creditors consenting that the refunding shall be completed as a Plan of Composition.*

The over-all settlement program that the City adopted and put into effect in 1937 was partially completed by consummating the voluntary refunding and subsequently compromising a substantial majority in amount of the non-participating claims. The over-all program is evidenced by Ordinances 269 and 289, the agreement of December 24, 1936, proposed to creditors generally, the Barker Committee contract of February 3, 1937, and the Exselsen contract of June 30, 1937, providing for the negotiation of compromises, on terms as favorable to the City as could be developed, with minority creditors who had not consented to the refunding when it was declared operative.

The Exselsen contract is as much a part of the over-all program as if its provisions had been set out in full in the ordinances or other contracts. The fact that it is a separate instrument does not make it any the less a part of the program. That program, as evidenced by the several instru-

ments, provided that the refunding should be "consummated" when accepted by holders of an amount of the indebtedness, in no event less than 90%, sufficient to assure its feasibility, practicability and success, and that compromises, on terms as favorable to the City as could be developed, should thereafter be negotiated with the remaining creditors.

The refunding authorized in Ordinances 269 and 289 is merely a part of the much broader and more extensive over-all settlement program, and is in no sense a partially completed Plan of Composition, nor is it the entire program that was put into effect in 1937, and partially executed. Consequently, the City has been forced to abandon its original contention that the issuance and voluntary acceptance of the new securities had resulted in the partial completion of a Plan of Composition comprised solely of Ordinances 269 and 289, and that the consents of holders of the new securities were sought to be used solely for the purpose of coercing the completion of a partially completed plan.

In lieu of the abandoned contention, the City now urges that notwithstanding the refunding of more than 90% of the indebtedness and the compromising of a substantial majority in amount of the non-participating claims, § 83 (j) nevertheless permits the dropping of the provision for compromises, the re-enactment and submission of only the refunding provisions, not as a partially executed but as a new Plan of Composition, and the use of consents thereto by holders of the new securities to coerce the acceptance of like securities in satisfaction of the remaining unrefunded and uncompromised claims. That is what the City means when it says that the purpose of § 83 (j) is to permit a creditor who has accepted new securities under a refunding plan to "be classified with holders of old unrefunded securities and to vote his consent in a bankruptcy proceeding

offering a plan of composition of all of the debts of the taxing agency, refunded and unrefunded, *whether or not the plan of composition offered in the bankruptcy proceeding is identical with the plan of refunding theretofore accepted by such holder of refunding securities*" (Brief p. 32, Emphasis supplied).

Section 83 (j) should not be so construed. Prior to its enactment, the partial completion or execution of a refunding plan by the issuance and voluntary acceptance of new securities was "construed as limiting or prohibiting the effect of" Ch. IX, to the extent that holders of the new securities could not be counted as consenting creditors in a proceeding subsequently instituted for the confirmation and completion of the refunding plan as a Plan of Composition. *In re City of West Palm Beach*, 5 Cir., 96 F. 2d 85.

To meet and overcome the effect of that decision, Congress enacted § 83 (j), which provides:

> "The partial completion or execution of any plan of composition as outlined in any petition filed under the terms of this title by the exchange of new evidences of indebtedness under the plan for evidences of indebtedness covered by the plan, whether such partial completion or execution of such plan of composition occurred before or after the filing of said petition, shall not be construed as limiting or prohibiting the effect of this title, and the written consent of the holders of any securities outstanding as the result of any such partial completion or execution of any plan of composition shall be included as consenting creditors to such plan of composition in determining the percentage of securities affected by such plan of composition."

The purpose and declared intent of Congress was to prohibit the construction given Ch. IX in the *West Palm Beach* case. This was done by authorizing the consents of holders of new securities to be counted as votes favoring the

enforced completion, against minority creditors, of the identical refunding plan theretofore partially executed by the issuance and acceptance of the new securities. Such intent is shown conclusively by the report of the Committee of the Judiciary accompanying H. R. 10753, which states:

> "The necessity for the amendment arises by virtue of the decision of the Circuit Court of Appeals, Fifth Circuit on April 14, 1938, in the West Palm Beach, Florida case, where it was held that the act permits only plans of composition which are wholly executory, and that evidences of indebtedness already exchanged under the plan, prior to the filing of the petition, could not be included in computing the necessary percentage of securities held by consenting creditors to declare the plan operative.
>
> "H. R. 10,753, would permit the court to include new refunding bonds already exchanged under the plan of composition when figuring the percentage of consenting creditors, regardless of whether such exchange was completed before or after the filing of the petition.
>
> "In the West Palm Beach case about 85% of new bonds had been exchanged prior to filing the petition. The plan cannot be enforced under the Circuit Court of Appeals case unless 66⅔% of the remaining 15% give their approval, thus effectively preventing the operation of the act of 1937." (As printed in 112 F. 2d 436, 437.)

The plain intent of Congress was to provide that when a refunding plan has been partially executed by the issuance and voluntary acceptance of new securities, the refunding plan may be converted into and submitted as a Plan of Composition, in which event, holders of the new securities may be counted as consenting creditors. It was not the intent of Congress to provide that holders of such new securities could be counted as creditors consenting to a so-called plan of composition that is actually only a part of the over-

all settlement program under which the new securities were issued and accepted. *American National Bank* v. *City of Sanford*, 5 Cir., 112 F. 2d 435, certiorari denied 311 U. S. 677; *Davis* v. *City of Homestead*, 5 Cir., 112 F. 2d 438, certiorari denied 311 U. S. 678.

Section 83 (j) "was passed to meet the situation dealt with in" the *West Palm Beach* case, and "is effective to meet and provide a remedy for that situation." It merely enables a Petitioner "to enter with its bondholders upon consideration in the bankruptcy court of the plan of composition now for then as of the date when the voluntary plan was first proposed. So viewed, the amendment is brought directly within the principle on which compositions both private and public have been affirmed as valid, that where a sufficient number of those similarly situated with regard to the composition have approved it, no-one's rights can be or have been, constitutionally impaired." Congress merely provided "in effect that the plan thus open and continuing, could be presented and considered now as of the time of its inception." *American National Bank* v. *City of Sanford*, *supra*. The only purpose of § 83 (j) is "to render it possible to include as creditors affected by a plan persons holding securities received in the partial execution of the plan." *10 Remington on Bankruptcy*, § 4349.

A comprehensive statement of the purpose, scope and effect of § 83 (j) was made by Giles J. Patterson, Esq., in an article published in the University of Pennsylvania Law Review (Vol. 90, No. 5, March, 1942). After referring to the *Sanford* and *Homestead* cases, Mr. Patterson said:

> "It should be noted, however, that both cases arose upon motions to dismiss, and the Court did not determine whether a change of circumstances, or events happening since the plan was originally proposed, would result in discrimination between creditors of the same class or would produce inequity. The amendment is

merely permissive. *It makes it possible for a plan that has been partially carried out before the proceeding is filed to be made binding on dissenters;* but if making the plan effective at a later date would render the plan unfair and inequitable, or would result in discrimination for or against creditors, or would not be for the best interests of creditors, the court must disapprove the plan, regardless of the consents of other creditors." (Emphasis supplied.)

The views expressed by Mr. Patterson are in accord with those of the Court of Appeals in the instant case. The main and minority opinions agree that the only purpose for which holders of new securities may give effective consents is to bind non-consenting creditors to the partially executed plan under which the new securities were issued and accepted.

The City argues that the refunding provisions could be segregated from the remainder of the over-all settlement program and be re-enacted as a Plan of Composition, after which holders of the new securities could effectively vote that the unrefunded and uncompromised claims be bound thereby. It relies principally on *Wells Fargo Bank & Union T. Co.* v. *Imperial Irr. Dist.*, 10 Cir., 136 F. 2d 539, in which the Court, by strained construction of the wording of § 83 (j), arrived at a conclusion in direct conflict with the expressed intent of Congress.

The cited case and the argument of the City each ignore the plain mandates of Ch. IX. Section 83 (d) provides that a "plan of composition shall not be confirmed until it has been accepted in writing, by or on behalf of creditors holding at least two-thirds of the aggregate amount of claims of all classes *affected by such plan.*" (Emphasis supplied.) When there is to be no further or additional abnegation or sacrifice by the holders of new securities, and their existing claims are not to be reduced in amount or otherwise modi-

fied or altered, the only Plan of Composition by which their claims have been or will be "affected," and therefore, the only plan to which they can consent, is the identical plan under which their new securities were issued and accepted. If they are to vote, the plan submitted with the petition must be the one under which their new securities were accepted, otherwise their claims will not be affected by it, and they cannot vote for its confirmation.

The acceptances result in a "contract, proposed by the debtor and agreed to by those of the creditors who give consent, and they in the requisite majority bind all. The interlocutory decree confirms it and establishes it as regular and lawful." *American United Life Ins. Co.* v. *Haines City*, 5 Cir., 117 F. 2d 576. To give § 83 (j) the construction urged by the City would be to permit the City and creditors who have exchanged their securities under one contract to bind the remaining creditors to a new and different contract. The new securities were issued and accepted under the overall settlement program, which provided for the refunding of only the claims of the participating creditors and for the best possible compromises of the unrefunded claims. The holders of new securities then approved and expressly consented to preferential and discriminatory settlements of a substantial majority in amount of the unrefunded claims. Having made and consummated that contract, they and the City could not subsequently make a new and different contract binding the remaining creditors to accept new securities in satisfaction of their unrefunded and uncompromised claims.

Any other interpretation would lead to the anomalous result ordered by the Interlocutory Decree. The so-called Plan of Composition provides for the refunding of the claims of all creditors as of January 1, 1937 (R. 62). The Interlocutory Decree purported to confirm it, but actually

altered it materially concerning the refunding of the claims of six creditors whose judgments were substantially reduced by payments made during the partial execution of the over-all settlement program (R. 1829-34). Instead of requiring the refunding of those claims as of January 1, 1937, the effect of the Decree was to direct the refunding of the balances unpaid July 1, 1940, a day subsequent to the filing of the Petition (R. 1831, 1).

The relief purportedly sought by the Petition was the confirmation of a so-called Plan of Composition providing for the refunding of the claims of all creditors as of January 1, 1937 (R. 1-111). In final analysis, the relief actually sought was to compel the refunding as of January 1, 1937, of the claims of the following creditors:

1. Wright.
2. The Bank.
3. The unknown holders of fifty bonds.
4. E. B. Connolly (judgment not on bonded indebtedness).
5. Parker Maxwell (judgment not on bonded indebtedness).
6. Fiduciary Council, Inc.
7. C. J. Root.
8. Augustus T. Ashton.
9. Lois Harmon.
10. W. J. Noel.
11. G. E. Vallette.

Had the Interlocutory Decree not been reversed, its effect would have been to force the refunding of claims Nos. 1 to 5, inclusive, as of January 1, 1937, while authorizing and directing the refunding of claims Nos. 6 to 11, inclusive, as of July 1, 1940 (R. 1829-34). So strange a result would have grossly violated the fundamental bankruptcy rule of equality between creditors.

For example, on January 1, 1937, the claim of Augustus T. Ashton (No. 8, *supra*) was made up of the following refundable items (R. 1629):

Bonds	$10,000.00
Interest Coupons	247.50
Interest after maturity on past due bonds	3,108.75
Total	$13,356.25

The so-called Plan of Composition provided for the refunding of the claim by the issuance to Ashton of $5,000 Refunding Bonds and $8,356.25 Tax Participation Certificates (R. 57-108), and the Interlocutory Decree commanded that Wright accept new securities, in those amounts, for that much of his claim (R. 1829-34). However, Ashton reduced his claim to judgment July 17, 1937 (R. 42-43), with the result that interest which accrued after January 1, 1937, together with court costs, increased the claim to $13,771.35 (R. 1629), and up to July 1, 1940, he was paid $8,828.04 on account of that total (R. 1629). The Interlocutory Decree commanded the refunding of only the balance of $4,943.31 unpaid on July 1, 1940 (R. 1831). The command gives rise to at least the following questions: Had the Interlocutory Decree not been reversed, should the balance have been refunded as principal or interest? Should Ashton have received Refunding Bonds, or the relatively worthless Tax Participation Certificates, or both Refunding Bonds and Tax Participation Certificates, and if both, in what proportions?

If it be assumed that the balance of the Ashton claim should have been refunded by the issuance of Refunding Bonds and Tax Participation Certificates in equal amounts, the following table illustrates the practical effect of the construction of § 83 (j) urged by the City, and demonstrates

that such construction would result in unfair discrimination in favor of Ashton as against Wright:

	Ashton would have received for his claim as of 1/1/37.	Wright would have received for a like amount of his claim as of 1/1/37.
Cash	$8,828.04	$ None
Refunding Bonds	2,471.65	5,000.00
Tax Participation Certificates	2,471.65	8,356.25
Totals	$13,771.34	$13,356.25

During the period Ashton received cash payments aggregating $8,824.04, the market value of the Refunding Bonds ranged from 45¢ to 60¢ on the dollar, and that of the Tax Participation Certificates from 5¢ to 9¢ on the dollar (R. 1639, 1640). With the cash so received, Ashton could have purchased in excess of $17,000 Refunding Bonds or in excess of $100,000 Tax Participation Certificates.

The fundamental rule that bankruptcies and compositions envisage equality of treatment of creditors would have been violated by the example given, and was grossly violated by the preferential and discriminatory settlements of a substantial majority in amount of the unrefunded claims. Because the holders of the new securities authorized and expressly consented to those settlements, they could not at a later time, give effective consents for the sole purpose of coercing the acceptance of new securities in satisfaction of the remaining unrefunded and uncompromised claims. In their dealings with the City they contracted that new securities should be issued to refund only their claims, and that compromises, on terms as favorable to the City as could be developed, should thereafter be negotiated with the remaining creditors. They could not subsequently make a new and different contract to become binding on

only the holders of the unrefunded and uncompromised claims. Section 83(j) does not, under the circumstances disclosed by the record, permit them to consent to the so-called Plan of Composition which the City falsely alleged to have been partially completed.

2. *The plan evidenced solely by Ordinances 269 and 289, sought to be put into effect by the petition, is not the plan proposed in 1937, and is not in any sense a partially executed Plan of Composition.*

The over-all settlement program is not a "plan of composition" within the meaning of the Bankruptcy Act. Neither is that program evidenced solely by Ordinances 269 and 289. On the contrary, it is composed not only of those Ordinances but also of the creditor contract proposed December 24, 1936, the agreement with the Barker Committee of February 3, 1937, and the Exselsen contract of June 30, 1937.

The over-all program falls naturally into two divisions —one portion providing for the refunding of not less than 90% of the indebtedness—the other expressly providing that special compromises be negotiated and made with creditors not participating in the refunding.

The refunding portion of the entire program is composed of the proposal to creditors dated December 24, 1936, and the agreement of February 3, 1937 with the Barker Committee. The former provided that the refunding plan, of which Ordinance 269 was expressly made a part (R. 1508), should become operative only when accepted by holders of a sufficient amount of the principal indebtedness, not less than 90%, to insure the ability of the City to perform the refunding and make it feasible and practicable (R. 1514). The latter provided that the refunding should be "consummated" when it was determined that an amount of the indebtedness sufficient to assure the success of the refunding

had become obligated to accept the new securities authorized by Ordinance 269 (R. 1478).

The legal effect of the two instruments is that the refunding should be "consummated" when the requisite consents were obtained and the new securities issued. Therefore, when the two agreements were declared operative and placed in effect in September, 1937, and the City delivered and participating creditors accepted Refunding Bonds and Tax Participation Certificates for more than 90% of the old claims (R. 1238-39, 1830), the refunding was fully completed. Nothing remained of the over-all program except the provision for compromise settlements with those creditors who did not participate in the refunding.

The Exselsen contract evidences not only the compromise portion of the over-all program, but also the intent that the refunding should be completed when the other agreements were declared operative and placed in effect. In it, the City and Exselsen finally merged "all previous writings and oral understandings between the parties concerning the amount of compensation and expenses to be paid said Exselsen for services already performed *and to be performed* in connection with the *consummation* of a debt refunding program acceptable to the City Commission" (R. 1473, emphasis supplied), and provided that the balance of Exselsen's $80,000 fee should become due and payable, when, as and if:

> "(1st) The terms and provisions of the 'Barker Committee' Contract of February 3, 1937, have been *consummated* by the physical exchange of new Refunding Bonds and Tax Participation Certificates, or other refunding securities, for the indebtedness represented by said Committee; and
> "(2nd) The terms and provisions of the Creditor Contract of December 24, 1936, have become operative * * * and the terms thereof have been *consummated* by the actual exchange of the new Refunding

Bonds and Tax Participation Certificates, or other refunding securities or considerations, for the indebtedness of the Creditors signatory thereto. * * *" (R. 1474-75, Emphasis supplied)

The contract also provided that Exselsen should "negotiate special adjustments with those creditors who may not have consented to the Refunding Plan at the time the same is declared operative, it being understood that each of such special adjustments is to be dealt with specially by the City Commission after the same have been negotiated to a point where the greatest savings can be effected and the most favorable terms to the City developed" (R. 1474-76).

After the completion of the refunding in September of 1937, the City abandoned and discarded that portion of its over-all program by proceeding under the compromise portion. From October of 1937 to December of 1938, inclusive, the City operated solely under the provisions of the Exselsen contract. With funds obtained from the sale of delinquent tax assets, the City made twenty-nine discriminatory and preferential settlements with creditors holding claims aggregating $597,448.17. It also entered into, and partially consummated, agreements for special discriminatory settlements with six other creditors, in two of which, involving claims aggregating $175,456.43, the City expressly covenanted that it would not resort to bankruptcy. The City repudiated the covenants by filing its petition in bankruptcy. All that then remained to be done under the over-all program was for the City to complete in good faith the special settlement agreements theretofore entered into but only partially consummated, and to reach agreements with Wright and the bank for the settlement of their claims aggregating $364,584.24 (R. 131, 135). Up to and including the day on which the Petition was filed, those claims had been the subject matter of intermittent negotiations looking

toward settlement thereof and the final completion of the over-all program.

Thus the Court of Appeals correctly concluded that the refunding provided for in the contracts with creditors had been fully completed nearly three years before the Petition was filed, not only in the respect that more than the 90% made a prerequisite to its taking effect had accepted and the City had declared it in effect, but also in the respect that thereafter the City irrevocably discarded and abandoned it by compromising the claims of other creditors under the terms of the Exselsen contract (R. 1866).

In this situation, and as a result of things done and actions taken in the partial completion of its over-all program, the City could not bring itself within the terms of § 83(j). Its new securities were not outstanding as the result of "the partial completion or execution of any plan of composition." In fact, the City had no partially executed "plan of composition." If the refunding portion of the City's over-all program could ever have been deemed a "plan of composition," that portion was fully completed according to its terms and thereafter irrevocably discarded as a Plan of Composition by the making of discriminatory and preferential settlements, hence was not, and could not be revived as, a partially executed Plan of Composition. The over-all settlement program was partially completed, but was not in 1937, is not now, and could never be a "plan of composition" within the meaning of Ch. IX, because it did not provide for nor insist on equality of treatment of creditors, but expressly authorized discriminatory and preferential settlements with creditors who refused to accept the general refunding terms, and in the partial completion thereof discriminatory settlements were made. That program was not then, and cannot now be amended to be, a Plan of Composition within the meaning of Ch. IX.

The City evidently realized it had no partially completed "plan of composition," for it did not submit to the court the settlement program in its entirety, nor did it inform the court that the refunding portion thereof had been fully completed, and thereafter discarded by the making of special settlements. Instead, the City submitted only Ordinances 269 and 289, which were but a part of the completed refunding agreements, and falsely alleged in the Petition that the two ordinances had been partially completed as a Plan of Composition. The Petition did not disclose the existence of the additional provision that if any creditor should refuse to accept the general refunding terms, there should be a special discriminatory and preferential settlement of his claim on the basis of the best trade that could be made with him, nor did it disclose that such trades had been made with most minority creditors. The City attempted, by that means, to eliminate from the Court's consideration that portion of its partially completed over-all program providing for, and the fact of the actual consummation of, preferential and discriminatory settlements with creditors who were not willing to accept the new securities offered anew by this proceeding. The City sought to preclude the Court from considering those matters, respectively or otherwise.

Section 83(j) does not authorize the procedure followed by the City. The only jurisdiction it confers is to confirm and approve retrospectively a partially completed Plan of Composition that the Court could have confirmed and authorized prospectively. Congress did not intend, by the addition of § 83(j), to permit a debtor to do the very things that Ch. IX prohibits, and thereafter submit and have confirmed, under the guise of completing a partially executed plan, only a partial re-enactment that eliminates from consideration the things done and action taken in direct violation of the principles of Ch. IX. Had the Interlocu-

tory Decree not been reversed, the City would have accomplished just that. It would have partially completed a settlement program which expressly provided for, and in the partial completion whereof the City made, preferential and discriminatory settlements with creditors in the same class as Wright, and after eliminating from the program the provision for such special settlements, would have coerced Wright to accept consideration different from and less valuable than the consideration afforded any creditor dealt with specially.

The City now argues that Ch. IX permits the making of discriminatory settlements if creditors receiving the more valuable consideration do not vote in favor of the plan. In so contending, the City relies on cases in which confirmation of a Composition was denied because some creditor received a special favor or inducement influencing him to vote in favor of the plan. From these holdings the City deduces the theory that the prohibition in § 83(e) against unfair discrimination "in favor of any creditor," merely prohibits unfair discrimination in favor of creditors who vote for confirmation.

The theory overlooks the reason underlying the fundamental principle of the bankruptcy law that there shall be equality among creditors of the same class. A composition is nothing but a contract between a debtor and its creditors, offered by the debtor and accepted by majority creditors, who by their consents bind all. *American United Life Ins. Co.* v. *Haines City, supra.* Its very purpose is to enforce equal abnegation and sacrifice on all creditors alike. To permit a debtor and majority creditors to discriminate in favor of some minority creditors and against others of the same class would do violence to that principle and the reasons therefor. No plan should be confirmed which does not rigorously insist on equality of treatment of creditors.

This Court has so held. In *American United Mut. Life Ins. Co.* v. *Avon Park*, 311 U. S. 138, it said:

> "Compositions under Ch. IX, like compositions under the old § 12, envisage equality of treatment of creditors. Under that section and its antecedents, a composition would not be confirmed where one creditor was obtaining some special favor or inducement not accorded the others, whether that consideration moved from the debtor or from another. *In re Sawyer*, Fed. Cas. No. 12,395; *In re Weintrob*, 240 Fed. 532; *In re M. & H. Gordon*, 245 Fed. 905 • • • That rule of compositions is but part of the general rule of 'equality between creditors' (*Clark v. Rogers*, 228 U. S. 534, 548) applicable in all bankruptcy proceedings. That principle has been imbedded by Congress in Ch. IX by the express provision against unfair discrimination."

In the case of *In re M. & H. Gordon*, cited and relied on in the above quotation, the Court said:

> "The fundamental theory and purpose of a composition agreement is that all creditors shall be treated alike, and that none shall have any advantage, secret or otherwise, over the other • • • any arrangement which contemplates the payment to one creditor of one cent more than is to be paid to another creditor in the same class is the kind of an arrangement which the law will not permit, and which will result in the disapproval by the Court of a composition agreement."

And in *Kaufman County Levee Imp. Dist. No. 4* v. *Mitchell*, 5 Cir., 116 F. 2d 959, 960, the Court said:

> "It is a fundamental principle of the bankruptcy law that there shall be equality among creditors of the same class."

Pursuing the theory to its ultimate limits, and thereby reducing it to absurdity, if the City can accomplish its purpose here, and force opposing creditors to accept a less

valuable consideration for their claims, as of January 1, 1937, than was afforded any creditor dealt with specially, a debtor can propose a plan, obtain acceptances by holders of 66⅔% of the claims affected, thereafter pay 33% of the claims in full, and subsequently utilize § 83(j) to coerce the remaining ⅓ of 1% to accept the terms offered initially.

Except as to degree, the foregoing illustrates exactly what the City and majority creditors were attempting to do by this proceeding. The Court of Appeals correctly decided that § 83(j) does not authorize the accomplishment of any such result. Its accomplishment would violate every mandate of Ch. IX.

The result would not be fair to Wright and other opposing creditors because it would coerce them to accept from 28.21% to 530.76% less consideration for their claims than was received by creditors of the same class who were dealt with specially (R. 1639, 1640). By the same token, it would discriminate unfairly in favor of those creditors dealt with specially as against opposing creditors. It would be inequitable because it would not affect all claims alike, in fact would affect no claims except those of opposing creditors. It has not been accepted in writing by two-thirds of the claims affected, because no consenting claims are affected by it. Neither does it affect claims of more than half of the non-consenting creditors as of January 1, 1937. It would further discriminate unfairly because the claims of non-assenting creditors that are affected are not affected in the same degree, as is illustrated by the foregoing comparison between Ashton's claim and a like amount of Wright's claim. It would not be for the best interest of any creditor, but only for the best interest of the City, because it would coerce opposing creditors to accept less than the City is well able to pay. On that point, the uncontradicted evidence is that the City could, at an annual cost actually less than the annual debt service tax levied

prior to 1940, and without jeopardizing its 1937 refunding in the slightest, issue and service thirty year, 4% serial Refunding Bonds to pay the claims of opposing creditors (R. 1017, 1022, 1033, 1037-38, 1045, 1630).

The City further contends that the discriminatory settlements are not prohibited by Ch. IX, because they were made with the so-called "free funds," that is, from funds not pledged to the payment of the Refunding Bonds. The District Judge agreed, and attempted to support the special settlements by stating they were made, not only from "free funds," but also because of the pressure of litigation (R. 1778). He thereby overlooked the fact that when the settlement program was put into effect in September of 1937, after Ch. IX became effective August 16, 1937, the City had an opportunity to treat all creditors fairly and equitably by seeking confirmation of its refunding plan as a Plan of Composition, and could thus have obviated any pressure of litigation. The City considered the matter, but decided it would not submit itself to the jurisdiction of the Bankruptcy Court. By that election, the City voluntarily chose to, and did, make the discriminatory special settlements, thereby forever precluding the possibility of affording equality of treatment to all creditors. Because the special discrimnatory settlements were made as a result of that election, the City is now estopped from forcing Wright to accept the general refunding terms.

The fact is that not all of the special settlements were made with the so-called free funds, and the District Judge so found (R. 1833-34), in contradiction of his prior finding to the contrary (R. 1778). The consideration paid to the beneficiaries of the twenty-nine settlements involving claims totalling $597,448.17 did come from that source, but the installment payments to Root and Fiduciary Council did not (R. 467-69). Those payments came from special earmarked annual tax levies made for the sole and exclusive

benefit of the two creditors (R. 1603, 1609, 1614, 1620), and the City proportionately reduced the minimum levies pledged for the payment of the new securities (R. 1833-34). Consequently, a part of the installment payments to Root and Fiduciary Council were made from the proceeds of taxes which the City covenanted that it would, but did not, levy for the payment of the new securities.

The position of the City is not helped by the fact that some special settlements were made with the so-called free funds. Its contention is that creditors who accepted new securities could waive the rights of other creditors to be paid pro rata shares of the proceeds of an available asset. From that premise, the City draws the conclusion that it is not discriminatory to deprive the entire class of the asset and use the proceeds to discharge and satisfy the claims of some members of the class. The argument is that majority creditors can waive the right of the minority to share in the distribution of a fund, thereby forcing the minority to accept less consideration than the debtor is reasonably able to pay, and can then authorize the use of the fund to satisfy the claims of some members of the minority. The entire argument is founded on the false premise that the majority can force the minority to waive at least the following two rights guaranteed by Ch. IX: first, that the consideration offered them must be all the debtor is reasonably able to pay, and, second, that there shall be no unfair discrimination in favor of any creditor. The false premise overlooks the rule that minorities "cannot be deprived of the benefits of the statute by reason of a waiver, acquiescence or approval by the other members of the class." *Group of Industrial Investors* v. *Chicago, M. St. P. & P. R. Co.*, 318 U. S. 523; *Kelley* v. *Everglades Drainage District*, 319 U. S. 415.

The contentions advanced by the City do not withstand analysis. The Court of Appeals correctly concluded that

the plan evidenced solely by Ordinances 269 and 289 is not, and should not have been confirmed as, a partially completed Plan of Composition, and that the inescapable effect of the Interlocutory Decree was to countenance and authorize gross violations of the prohibition against unfair discrimination in favor of any creditor.

3. *The plan evidenced by Ordinances 269 and 289 was not submitted nor accepted in good faith, and the consents of holders of the new securities were improperly voted in its favor.*

The plan submitted to the Court was evidenced solely by Ordinances 269 and 289. The Petition falsely alleged that the plan so evidenced had been partially completed as a "plan of composition" (R. 13). The Petition did not disclose the existence of the Exselsen contract providing for compromises with creditors who had not consented to the refunding when it was declared operative, nor did the Petition disclose that any of the special settlements had been consented to and made after the new securities were issued and accepted. It further did not disclose that in the original offer and acceptance of the refunding portion of the over-all program, the City and participating creditors covenanted that the refunding should be placed in effect and completed when holders of an amount of the indebtedness, in no event less than 90%, sufficient to assure the feasibility, practicability, and success of the refunding, had become obligated to accept the new securities authorized by Ordinance 269 (R. 1478, 1514). The true facts were brought out by Wright and other opposing creditors.

The false allegation, coupled with the failure of the City to make full and unequivocal disclosure, not only of its overall program, but also of the action taken and things done thereunder, are sufficient to support the decision that

the submission of only Ordinances 269 and 289 was not in good faith (R. 1867). In *American United Mut. Life Ins. Co.* v. *Avon Park, supra,* this Court held that the "very minimum for fair dealing was the elementary obligation of full disclosure," and "emphasized that full disclosure is the minimum requirement" for good faith within the meaning of § 83(e)(5).

The City also made representations, both in submitting the plan and in soliciting consents to it, which deprived the offer and acceptances of the good faith required by § 83(e)(5). On February 24, 1940, the City wrote a form letter to each holder of new securities, reading in part as follows:

> "You and others representing 94.18% of the City's obligations consented to the refunding, and exchanged your bonds for the new refunding securities. The holders of 1.84% of the obligations sued and reduced their claims to judgments while the refunding was in progress. The holders of the remaining 3.98% (326,000 of bonds) have not seen fit to cooperate, • • • The City Commission is not willing to grant to these few nonconsenting creditors a better settlement than that which you accepted. Negotiations with these "holdouts" having failed, to complete the refunding the City is compelled to avail itself of the Municipal Bankruptcy Act. Municipal Bankruptcy proceedings can not and will not change the terms of the refunding bonds or tax participation certificates which you hold. The results will apply only to the unrefunded bonds. • • • we ask that you immediately fill in, execute, and return in the pre-addressed postal permit envelope, the enclosed preliminary consent and statement upon which the City will prepare and send to you for execution the final consent, which will be necessary to enable the City to initiate and support the proceedings. This consent will not obligate you financially in any way, and is merely a ratification of your acceptance of the refunding plan" (R. 1573-75).

The representation that creditors holding 94.18% of the obligations had consented to the refunding and exchanged their bonds for new securities, was false and untrue, and was known by the City to be false and untrue. Mathematical calculation demonstrates that the percentage includes former claims, aggregating more than $600,000, that had been preferentially compromised and discharged under the terms of the Exselsen contract (R. 1521-29). The holders of those claims did not consent to the refunding, and had not exchanged their bonds for new securities (R. 1517-18). Those holders were paid and received cash, instead of the new securities that would have been allotted to them had they consented to the refunding (R. 1521-29). Thereupon, the City purportedly refunded the discharged claims by issuing to itself new securities in amounts equal to or exceeding those the former creditors would have received (R. 790-819). The obligations thus purportedly refunded included several judgments that had been satisfied, in whole or in part, by discriminatory settlements (R. 1518, 1521-29).

When the letter was written, 5.82% of the indebtedness was unrefunded. This percentage was composed of the following (R. 778-81):

Unrefunded claims of unknown creditors	0.91%
Unrefunded claims of Wright and the Bank	3.07%
Unrefunded claims of six judgment creditors	1.84%
Total	5.82%

Since 5.82% of the indebtedness was unrefunded, the remaining 94.18% mentioned in the letter necessarily included all discharged claims on which the City had issued Refunding Bonds to itself. Therefore, the City knowingly misrepresented the facts to the creditors from whom consents were solicited and obtained. Substantially the same misrepresentation was made in Ordinance 347, enacted

March 5, 1940, in which the City attempted to re-enact §§ 1 to 20, inclusive, of Ordinance 269, as amended by Ordinance 289, as a Plan of Composition, and directed the preparation and filing of the Petition by which this proceeding was instituted (R. 7, 108-10).

Another reason why the so-called Plan of Composition was not offered and accepted in good faith is that the real purpose underlying both the offer and acceptance is to "budgeon" Wright and the Bank into submission. The proceeding is purportedly directed against the holders of all unrefunded claims, but the conclusion is inescapable that it would never have been brought had the City succeeded in its efforts to settle the claims of Wright and the Bank on terms satisfactory to itself.

After the issuance of new securities to the accepting creditors, the City negotiated with Wright for the purchase of his claims (R. 1275). By falsely representing to him that some third person might be induced to buy his bonds (R. 1275) and concealing from him the fact that the City had money available for that purpose (R. 1276), the City induced him to sell his past due bonds (R. 1524, 1274-75). Thereafter, the City negotiated with him intermittently in 1938, 1939, and during the first six months of 1940, with a view to reaching a settlement of his other claims, but they could not agree on terms satisfactory to the City (R. 1870, 859-62, 1280-84).

Having found itself unable to bring the negotiations to a satisfactory conclusion, the City wrote the form letter of February 24, 1940, soliciting the consents of holders of new securities to the completion of Ordinances 269 and 289 as a partially completed Plan of Composition (R. 1573-75, 875, 1862). The letter stated that a non-cooperative holder of $252,000 unrefunded bonds had announced his intention to attempt to recover his full principal and accrued interest, that he had brought suit on interest coupons, that negotia-

tions with him had failed, that the City was not willing to grant him a settlement better than the one accepted by holders of new securities, and therefore, that the City desired the consents of holders of the new securities to complete the refunding under the Municipal Bankruptcy Act (R. 1573-74). Wright was the holder of the $252,000 unrefunded bonds (R. 109).

On March 5, 1940, still without having finally terminated the negotiations with Wright, the City enacted Ordinance 347 showing on its face that it was directed against "Ed C. Wright and Associates," because there appeared to be "no hope of an amicable settlement with the said bondholders" (R. 109). The Petition for confirmation of the so-called Plan of Composition was then prepared, and was signed by the proper City Officials, but its filing was withheld pending further negotiations with Wright (R. 1281). The negotiations were in progress until and including June 27, 1940, the day on which the Petition was filed, and were not terminated until later that day, when the fact that the Petition had been filed was announced to conferees who had met by appointment to again discuss terms of settlement (R. 1, 1280-84, 1870).

It is clear that the consents were solicited and obtained, Ordinance 347 was enacted, and the Petition was prepared and signed, all as a basis for bargaining with Wright and of attempting to threaten and club him into accepting terms of settlement less favorable than those to which he believed himself entitled. The Petition was filed when, and only when, the City concluded that it could not be used to force the acceptance by Wright of settlement terms satisfactory to itself. It was then, and only then, that the City decided it would use the consents in an effort to force new securities on Wright. The real purpose of the proceeding is to "bludgeon" him into submission. The Circuit Court of Appeals correctly decided that the endeavor to accomplish

that purpose deprives the offer and acceptance of the legal good faith required by § 83 (e) (5).

The position taken by the dissenting Circuit Judge merely emphasizes the foregoing. He treated the proceeding as being what it is—a law suit brought against Wright, and based his conclusions on the false premise that the City, through the operation of Ch. IX, has a vested right to force some kind of settlement on Wright.

A further reason why the offer and acceptance are not in good faith is that the consents were solicited and given for the sole purpose of enabling the City to complete Ordinances 269 and 289 as a so-called partially completed Plan of Composition, whereas the City now seeks to use them for another purpose. The form letter of February 24, 1940, and the acceptances, show on their faces that the only consents solicited or given were to "the completion of said plan for the composition of said debts under" Ordinances 269 and 289. In soliciting consents, the City expressly assured holders of the new securities that such consents would be but formalities, and would not in any way affect the rights or interests of those consenting. Since the City now asserts that it was not seeking to use the consents for the purpose for which they were solicited and given, but was seeking to use them for another and different purpose, it necessarily follows that their attempted use is not attended by good faith.

A still further reason why the offer and acceptance are not in good faith is that the holders of new securities were estopped to give the acceptances solicited and sought to be used by the City. Those creditors originally consented to the over-all settlement program providing for the issuance of new securities to refund only the claims of participating creditors, and further providing that the claims of non-participating creditors should be compromised on the best possible terms. The holders of new securities thereafter

consented to discriminatory settlements of a majority in amount of the unrefunded claims. They are now attempting to consent that new securities shall be forced on the holders of the remaining unrefunded and uncompromised claims.

When they consented to the discriminatory and preferential settlements, they estopped themselves to make any further contract concerning the rights of the remaining creditors. They could not make themselves arbiters of the over-all settlement program to the extent of contracting, on one hand, that discriminatory and preferential settlements should be made with some minority creditors, and of later contracting, on the other hand, that less favorable terms should be forced retrospectively on the remaining creditors of the same class. The two positions are inconsistent and conflicting.

Consents to a Plan of Composition must be consistent, continuing and persistent. The only thing to which creditors can consent is that equal treatment be accorded all creditors of the same class. The holders of the new securities attempted to go further, by consenting to the discriminatory and preferential settlements, and thereby estopped themselves to consent subsequently that less favorable terms be imposed retrospectively on the remaining creditors. Being so estopped, their latest acceptances are not in good faith. The estoppel deprived their action of good faith. The attempt to give the latest acceptances in the face of the estoppel is bad faith.

4. *The procedure suggested in the minority opinion should not be followed.*

The Circuit Judge who wrote a minority opinion correctly concluded that the only plan the City had partially completed was its over-all settlement program, of which "the special settlement idea was a material part * * *;"

and correctly interpreted § 83(j) as merely permitting the City to submit for confirmation the identical plan partially completed, but erred by not limiting the operation of Ch. IX to "plans of composition." He thought the fundamental requirement of equality between creditors could be disregarded if opposing creditors were offered "a settlement as favorable as the most liberal settlement heretofore made to any other creditor of the same class" (R. 1871).

The procedure he suggested should not be followed, because: 1) No creditor has consented, and none can consent, to the suggested procedure. 2) The partially completed over-all settlement program does not provide that the settlement offered any creditor shall be limited to the most favorable settlement made with any other creditor. 3) To offer non-consenting creditors the opportunity of accepting settlements as favorable as the most liberal made with any other creditor of the same class would require a change in the terms of the over-all settlement program, with the result that the plan then offered would not be the plan partially completed. 4) The suggested procedure contemplates the confirmation of a plan providing expressly for unfair discrimination between creditors of the same class, in direct violation of the statutory prohibition.

Conclusion.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MILLER WALTON,
S. O. CARSON,
Attorneys for Respondent, Ed C. Wright.

WALTON, LANTAFF, ATKINS & CARSON,
Of Counsel.